Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BONITA A. BURKS,

Petitioner,

versus

DEPARTMENT OF ARIZONA ECONOMIC SECURITY,
Employment Tax Audit Office -- Mesa,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. When circumstantial evidence was the only evidence available to the Petitioner to prove defendant's racial and sexual discriminatory intent, did the Court of Appeals properly find that the circumstantial evidence submitted by Petitioner was insufficient to permit her to meet the requisite burden of proof, or refute the proffer of defendant, particularly in view of the holding by this court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)(holding that a court assessing an equal protection claim based on race discrimination must engage in a sensitive inquiry into such circumstantial and direct evidence of intent as may be available).

2. Upon a finding that the District Court had jurisdiction over Petitioner's reasonably related claims of both race and sex discrimination, which were alleged through Petitioner's amended EEOC charge and Federal District Court complaint, did the appellate court reasonably determine that Petitioner failed to establish a prima facie case of sex discrimination upon the circumstantial evidence available to her, again in keeping with this court's holding in *Arlington Heights*, Id.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") is reported at *Burks v. Department of Arizona Economic Security, Employment Tax Audit Office_Mesa,* ___ F.3d ____, Unpublished Disposition, 2001 WL 275071 (9th Cir. 2001). The opinion of the District Court was not published. (Appendix A and B)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 19, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1964, inter alia, makes it "an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . sex. . ." 42 U.S.C.A. § 2000e-2(a)(1).

42 U.S.C.A. § 2000e-2(a)(1)-(2) provides:
(a) Employer practices
It shall be an unlawful employment practice for an employer__

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(m) provides as follows:

> Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Federal Rule of Civil Procedure 56(b) and (c) provides:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross_claim is asserted or a declaratory judgment is sought may, at any time, move with or

without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The District Court granted the motion for summary judgment against Burks filed by the Department of Arizona Economic Security, Employment Tax Audit Office - Mesa ("DES") under Rule 65 of the Federal Rules of Civil Procedure. By awarding DES summary judgment, Burks was prevented from presenting to a jury probative evidence related to racial and sexual animus. On appeal, a three judge panel of the Ninth Circuit affirmed the District Court's order granting summary judgment. *Burks v. Department of Arizona Economic Security, Employment Tax Audit Office*__Mesa, ___ F.3d ____ Unpublished Disposition,

2001 WL 275071 (9th Cir. 2001). Petitioner's request for a writ of certiorari is based upon this adverse ruling.

The Tenure and Termination of Burks' Employment

In 1995, Petitioner Bonita Burks, a black female, sought employment with the State of Arizona. Having been informed of job openings in the Unemployment Insurance Tax Section of DES, Burks interviewed for a job as Tax Auditor. A panel consisting of Richard Barrey, Erik Gross, and Kathy Whaley interviewed Burks and approved her hiring. Burks accepted the position . Burks was one of six (6) persons, all female, hired during that recruitment. She and two of the other new hires, Alfreda Stanley (a Native American) and Jessica Netzer (a Caucasian), were assigned to the Mesa, Arizona field office. Burks and the others first reported to work on Monday, October 30, 1995, although Burks' official date of hire, as reflected on the DES personnel documents, was October 28, 1995. DES designated October 28 as the effective date of Burks' hire. These three Mesa employees were supervised by Richard Barrey.

In evaluating Burks' job performance as a probationary employee, Barrey reviewed Burks' performance during two periods within the six month probationary period of her employment. The first evaluation was conducted at the end of the first three months; the second at the end of five months. At Burks' three month review, she was rated as "standard." At her five month review, Burks was rated at "below standard" and was not recommended for permanent status.

Prior to her five month review, Barrey intentionally altered the dates upon which Burks' efforts would be

evaluated. Upon her being hired by DES, Burks attended an Employee Performance Appraisal System (hereinafter "EPAS") planning session where she was shown the form to be used to document her performance appraisals.

The form set forth criteria and standards upon which Burks would be evaluated, and also listed " 10/30/95 to 4/30/96 " as the rating period for Burks' original probation (Appendix C). This form was used to rate or evaluate four different areas of Ms. Burks' performance. The first EPAS form evaluates "Goals and Objectives." The second EPAS form evaluates "Work Habits," and the third EPAS form contained in Appendix C evaluates "Policy and Procedures."

When Burks received her five month review, the EPAS rating and score listed the period of evaluation as " 10/28/95 to 4/27/96" (Appendix D). Due to the change in the evaluation period unbeknownest to Burks, four completed audits from March 28 to March 30th were not counted. Consequently, the shortening of the evaluation period caused Burks to wrongfully fall short of the number of completed audits required to meet a "standard" EPAS score in order to obtain permanent status. Burks conducted these audits in compliance with the terms of the evaluation period ending on April 30th which she signed off on 11/7/95.

DES has conceded that the dates upon which Burks' performance was evaluated were indeed changed as noted above. Through this lower score, DES created objective "proof" in support of Burks' assertions that DES "created" the circumstances that resulted in a "below standard" evaluation for her employment efforts. DES set Burks up to fail, plain and simple.

Burks also presented testimonial evidence in support of Barrey's potential for emotional outbursts, as well as other negative comments directed to Burks regarding her job performance. The harmful effect upon Burks was heightened by Barrey's previous displays of his hostile temperament.

Of particular significance was an incident where Barrey implied Burks was "out shopping" at a time when she was required to conduct field audits. The insinuation that Burks was shopping was directly related to the conduct of a former black female employee who was also rumored to have gone shopping during work hours. Through this comment it was obvious that Barrey perceived Burks as just another stereotypical black female. Barrey's actions indicated his intent to lump Burks in a category of behavior previously displayed by at least one other black female employee. This could be characterized as Barrey painting all black female employees with the same brush, even to the point of linking Burks' behavior to the historically racist view of blacks as 'lazy" or slothful. This is conclusive proof of the animus of racial and sexual discrimination, and more so because Burks was required to spend approximately 50% of her time in the field. For fully one half of her time on the job, Burks suffered the potential of having to defend herself against Barrey's prior implication that she had a propensity for stereotypical laziness due to her race and gender.

Having observed Barrey's tendency to generalize the behavior of black female employees, Burks was negatively impacted by any further adverse and belittling comments directed to her by Barrey. During her deposition Burks recalled another incident where Barrey inquired about rumors of employees desiring transfers from the Mesa

office.No one was transferred from the Mesa field office. Further, Barrey's actions in response to a grievance filed by Alfreda Stanley (regarding Barrey's comments about Stanley's job performance) could at best be characterized as retaliatory against Burks. As Burks noted in her deposition, Barrey received a reprimand regarding his conduct with Stanley, whereupon Burks felt Barrey was angered because he lost the grievance and considered Burks a disloyal employee worthy of his efforts to sabotage her.

EEOC Complaint

Upon her termination, Burks filed a charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") on October 23, 1996, initially alleging racial discrimination. Burks stated she based her claim upon racial discrimination at the hands of Barrey largely upon his determination that she did not meet the number of requisite DES audit quotas, a determination ultimately based upon the altered evaluation.

After its investigation the EEOC issued a right to sue letter wherein it was determined that "the EEOC is unable to conclude that the information obtained establishes violations of the statutes." On January 11, 1999, Burks timely amended her EEOC charge, which amendment relates back to the original date of the filing of the charge. Within this amendment Burks properly included the sexual discrimination charge based on the conduct of her supervisor Barrey. Such conduct was reasonably related to the allegations in her EEOC charge.

REASONS FOR GRANTING WRIT

The Petition Should Be Granted Because The Opinion Below Conflicts With the Opinions Of This Court And Other Circuits And Has So Far Departed From The Accepted And Usual Course of Judicial Interpretations, Or Sanctioned Such a Departure By a Lower Court As To Call For An Exercise of This Court's Supervisory Power.

The petition for writ of certiorari should be granted because the opinion below conflicts with this Court's previous rulings stating that discriminatory intent is generally harder to prove because there is typically no direct evidence of intent to discriminate. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977); *Personnel Administrator v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282 (1979). When there is no direct evidence of discrimination, the courts are to look at all the facts and circumstances to make a decision. *Arlington Heights*, 429 U.S. 252, 97 S.Ct. 555. Factors to be considered by the court include legislative history, disparate impact, foreseeability/inevitability of disparate impact, sequence of events, deviation from normal procedures and historical background. *Arlington Heights*, Id. at 266_68, 97 S.Ct. at 563_65. (emphasis added).

Unless this Court exercises its supervisory power, the decision of the Ninth Circuit will reduce the Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2(M) and the remaining precedent value of this Court's important decisions interpreting this statute to a meaningless mirage. The Ninth Circuit's interpretation of the amount and/or quality of circumstantial evidence presented by Petitioner to show the defendant's discriminatory intent strips this Petitioner, as well as other victims of race and sex employment discrimination, of the ability to present only documented

circumstantial evidence to prove the discriminatory intent of their employers.

Upon the Ninth Circuit's finding that Petitioner established a prima facie case of race discrimination, the burden properly shifted to DES to show that Petitioner was terminated "for a legitimate, nondiscriminatory reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The Ninth Circuit stated that it agreed with the District Court's holding that DES had met its burden by demonstrating that Burks was terminated as a result of her sub-par performance evaluations. Burks was then required to show that DES' proffered reason was "pretextual" and not the true reason for the employment decision, and that race was the true reason.

Since she possessed only circumstantial evidence of race discrimination, as is typically the case, Burks properly submitted the altered EPAS forms as the primary circumstance upon which discriminatory intent could be inferred. The EPAS are particularly unique in their evidentiary form in that they exist as a written memorialization of the conduct of DES.

The content of the written forms provides more tangible evidence of DES's conduct and intent, particularly when compared to other forms of evidence proffered by DES. Specifically, DES alleged that other probationary employees with whom Burks was hired had their evaluation periods changed, but were not terminated. Additionally, DES offered proof that a white employee who met her audit quota was not terminated. DES did not produce documentary evidence to show that it customarily alters

evaluation periods without communicating the change to the employees.

The Ninth Circuit Court failed to give proper weight to the EPAS forms, and the Court also failed to acknowledge that DES could have essentially covered its tracks, hiding its racially discriminatory intent by shortening the evaluation period of other employees who would have met the requisite audit quota even if their probationary period was shortened. Finally, upon being presented the altered EPAS forms, the Ninth Circuit failed to require DES to provide a race neutral explanation of such alterations, especially since the alterations fared negatively on Burks' employment evaluation.

Both the Employee Performance Documentation Forms and the Score Form included within the EPAS forms show the weighing and rating of Burks' performance (See Appendix C and D). The four particular areas upon which she and others were rated include work habits, relationships with people, policy and procedures, and goals and objectives. Each Employee Performance Documentation Form indicates each category in the upper left, so there is a form for each category.

To justify Petitioner's termination, DES posted Petitioner's failure to meet goals and objectives required by this first category. However, pursuant to the Score Form, apparently signed by the Petitioner's supervisors on April 10, 1996 and April 11, 1996, Burks received a score of 4.0, which is below the standard. Under the topic "Goals and Objectives", Burks' rating was "1", because DES used the wrong period of time in calculating the quotas (Appendix E).

Burks never received the altered EPAS forms, which clearly show on the first page that the evaluation dates were altered from 10/30/95 - 1/30/96 to 10/28/95 - 1/27/96 (Appendix C and D). The second page of the "Work Habits" EPAS was added on without her initials or approval. One may also assume that the other "add_ons" were likewise included without her knowledge or approval. The very last page, which covers "Goals and Objectives," gives her the "1" score because DES's calculation shows that she completed 83.33% of the assigned audit quota (see 1st page of Appendix D).

This failure to make Burks aware of not only the alterations, but the impact of the newly-imposed quota review period would lead a reasonable person to infer that DES's conduct was a deviation from its normal practices. When viewing the sequence of events, such deviation cries out for a race neutral explanation, particularly given the history of conflict between Burks and her supervisor Barrey. The District Court or the Ninth Circuit Court of Appeals should have required DES to make such an explanation. In finding that Burks' claims of race and sex discrimination were reasonably related, the Ninth Circuit properly accepted jurisdiction over Burks' claims. But the Court failed to place the proper weight upon the documented circumstantial evidence of DES's conduct as shown through the EPAS forms.

A review of the computer printout of Burks' performance evaluation entitled "Burks Inventory/Audit Findings: 5 Month EPAS Probationary Review" shows that Burks completed 20 of 24 audits. However, this inventory only goes through March 27, 1996 when it should have gone through March 30, 1996 (Appendix F).

On March 28, 1996, Burks completed three audits, and on March 29th she completed another audit (Appendix G). Had DES included these four additional audits then she would have completed 24 of 24, making her percentage 100% and not 83.33%. In turn, her score on the EPAS form entitled "Goals and Objectives" (Appendix D) would not be "1", which is in the unacceptable range. Instead, she would have fallen under the standard range at a minimum and would have scored a "5" or "6", just like the EPAS form contained in Appendix C. Extrapolating further by reviewing the calculation method contained in the Score Form on Appendix E, Burks' score under paragraph 13, "Goals and Objectives" would show a rating of "5" (4 X 5 = 20), thereby raising her weight/rate sum to 80 instead of 64. Dividing 80 by 16 equals 5, a period score that would have granted Burks permanent status with DES.

Burks was hired on October 28, 1995, but her first day of work was not until October 30, 1995, and therefore the rating period should have started on October 30, 1995 and each successive probationary review should apply through the 30th day of each month. For example, her third month probationary review should be from October 30, 1995 through January 30, 1996, and her fifth month probationary review should be through March 30, 1996.

DES not only failed to provide a non discriminatory basis for this disparity, but it also failed to provide any reason for its conduct, except to point out to the District Court that a white employee was subjected to the same shortening of the evaluation period and was not terminated. This white employee was able, for whatever the reason, to complete her evaluations within the shortened time period, when Burks was not. If DES intends to use this so-called "Objective" standard of counting audits, which supervisor

Barrey obviously placed much weight upon, then it should not make any difference if one employee completes his or her audit quotas before another employee does.

Given the burden of proof, it is incumbent upon DES to prove that Burks not only had the opportunity to conduct the requisite number of audits, but was aware that she must complete them within the shortened period. At no time did supervisor Barrey, or any other supervisor inform Burks that she was operating under the shorter period.

With regards to Burks' failure to meet her quota for the month of April, 1996, Burks had turned in two audits earlier in April and the remaining 6 were on her desk and about to be submitted. Subsequently, Burks was terminated and unable to submit them. It would not have made any difference whatsoever because on April 10, 1996, Barrey already signed the score form indicating that Burks would not be granted permanent status (Appendix E).

Burks did not meet the audit quotas for March because of Barrey's altering and tampering with the audit evaluation period. His statement heightens the extent of the trap he laid for Burks, by shortening the evaluation period and ensuring that a white employee, whose evaluation period was also shortened, had already acquired the requisite quota of audits.

CONCLUSION

By granting the Petition for Writ of Certiorari, this Court can correct the Ninth Circuit's decision. In so doing, this Court can prevent the loss of important ground gained against prejudice and discrimination in the workplace.

Accordingly, Petitioner respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted
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(any footnotes trail end of each opinion)
No. 99-16688

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BONITA A. BURKS,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARIZONA ECONOMIC SECURITY, Employment Tax Audit Office -- Mesa,
Defendant-Appellee.

February 13, 2001, Argued and Submitted, San Francisco, California

March 19, 2001, Filed

COUNSEL:
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JUDGES:
Before: B. FLETCHER, FERNANDEZ, and PAEZ, Circuit Judges. FERNANDEZ, Circuit Judge, concurring.

OPINION:

MEMORANDUM *

Plaintiff Bonita Burks appeals from the district court's order granting summary judgment in favor of the State of Arizona's Department of Economic Security ("DES") on her Title VII claims alleging race and sex discrimination and retaliation. Except as explained below, we have jurisdiction under 28 U.S.C. § 1291, and we affirm.

A. Race Discrimination

We review the district court's order granting summary judgment de novo, see, e.g., Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000), viewing the evidence in the light most favorable to Burks. Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 269 (9th Cir. 1996). Under the familiar standard for analyzing a claim of race discrimination under Title VII, the plaintiff first must establish a prima facie case of race discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). The district court assumed that Burks had met her burden, and so do we. The burden of production then shifts to DES to show that Burks was terminated "'for a legitimate, nondiscriminatory reason.'" Id. at 507 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). The district court held that DES had met its burden by demonstrating that Burks was terminated as a result of her sub-par performance evaluations. We agree. Lastly, to prevail, Burks must show that DES' "'proffered reason was not the true reason for the employment decision' and that race was." Id. (quoting Burdine, 450 U.S. at 256). This is referred to as a showing that the defendant's justification was "pretextual."

Because Burks relies on circumstantial evidence of race discrimination, she must produce "'specific' and 'substantial' [evidence of pretext] in order to create a triable issue with respect to whether the employer intended to discriminate . . . ." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998) (quoting Bradley, 104 F.3d at 270). We agree with the district court that Burks cannot meet this burden. Burks' primary allegation is that her supervisor, Richard Barrey, shortened her probationary period so that she could not complete her required number of assignments. But both of the other probationary employees with whom Burks was hired had their evaluation periods changed as well. A white employee was not terminated, but she had met her audit quota. Burks has not demonstrated that she and that employee were treated differently.

In her opposition to DES' motion for summary judgment, Burks said she had a witness, a black woman, who would testify that her review scores were also altered by Barrey. But that witness was not deposed and did not submit an affidavit. Burks' unsupported assertion about what the woman would say if called to testify cannot be considered "substantial" evidence. Next, the district court was correct to reject Barrey's remarks to Burks as having little probative value. The first comment, that Burks was going to be unable to meet her audit quota, was little more than an objective assessment of Burks' position. The second comment, that she was facing a transfer to another office, was also addressed to a white employee. And with regard to the third comment, that Burks had been shopping while on duty, Burks has admitted that she has no evidence that any prior African-American employee had been caught shopping while on duty.

Burks' subjective assessment of her performance carries little weight. See Bradley, 104 F.3d at 270. And her contention that she received positive feedback from other supervisors, Mark Zimmerman and Julian Rodela, is belied by those individuals' own depositions. In sum, Burks has failed to present specific and substantial evidence of pretext.

B. Retaliation and Sex Discrimination

To establish federal subject matter jurisdiction over an employment discrimination claim, a plaintiff must exhaust her administrative remedies by filing a charge with the Equal Employment Opportunity Commission ("EEOC"), before filing a federal court complaint. See, e.g., Paige v. California, 102 F.3d 1035, 1041 (9th Cir. 1996). The district court's conclusion that it lacked subject matter jurisdiction is reviewed de novo. See Botosan, 216 F.3d at 830.

Burks never raised her retaliation claim in her EEOC administrative charge. Because there is no evidence that the incident that allegedly resulted in the retaliation, Alfreda Stanley's grievance against Barrey, was motivated by racial or sexual animus, we cannot find that the retaliation claim is "reasonably related to the allegations of the EEOC charge. . . ." Oubichon v. North Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973). We lack jurisdiction over this claim.

After filing suit, Burks amended her EEOC charge to include an allegation of sex discrimination. We need not determine if that amendment was effective, because we hold that the district court had jurisdiction over the sex discrimination claim, which was "reasonably related to the allegations in the EEOC charge." Id. A reasonably thorough investigation of Burks' EEOC charge would have revealed

the allegation that Barrey accused Burks of shopping while on duty because a prior black female employee had been caught doing so. See Green v. Los Angeles County Superintendent of Schs., 883 F.2d 1472, 1476 ("In determining whether an allegation under Title VII is like or reasonably related to allegations contained in a previous EEOC charge, the court inquires whether the original EEOC investigation would have encompassed the additional charges."). The allegation involves a "combination of factors," both race and sex discrimination. Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994). Therefore, the two claims, race and sex discrimination, are reasonably related, and we disagree with the district court that it did not have jurisdiction over this claim.

However, we may affirm the district court's order granting summary judgment on any ground fairly supported by the record. Keyser v. Sacramento City Unified Sch. Dist., 238 F.3d 1132, 2000 WL 33155487, *6 (9th Cir. 2001). Because Burks has failed to establish a prima facie case of sex discrimination, we affirm. First, Burks was replaced by another woman, and, therefore, she cannot meet the test established by this court in Jones v. Los Angeles Community College Dist., 702 F.2d 203, 205 (9th Cir. 1983). Second, Burks suggests that her sex discrimination claim is also based on sexual harassment. But Barrey's stray comments do not constitute evidence of "conduct . . . severe or pervasive enough to create an objectively hostile or abusive work environment . . . ." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998). Furthermore, Burks presented no evidence that Barrey made any comments that were sexual in nature. Cf. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).

AFFIRMED.

CONCURBY:
FERNANDEZ

CONCUR:

FERNANDEZ, Circuit Judge, concurring:

I concur in the result. While I do not agree that we have jurisdiction over the sex discrimination claim, if we did the majority's resolution of it is flawless.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

No. 97-1337-PHX-RGS

UNITED STATES DISTRICT COURT FOR DISTRICT OF ARIZONA

BONITA A. BURKS,

Plaintiff,

v.

DEPARTMENT OF ARIZONA ECONOMIC SECURITY, Employment Tax Audit Office -- Mesa,
Defendant.

Filed 5/13/99

ORDER

Defendant moves for summary judgment on plaintiff's claims of race and sexual discrimination, arid retaliation. The motion has been fully briefed and the Court finds that defendant is entitled to judgment as a matter of law.

Plaintiff obtained employment with the State of Arizona in the Unemployment Insurance ("UI") Tax Section of the Department of Economic Security ("DES") as a Tax Auditor in October 1995. Five other women were among the new hires with plaintiff. Their first day of work was October 30, 1995 but the effective date of their employment was October 28, 1995 because it was the beginning of new pay period.

The new employees were supervised by Richard Barrey and were under a six-month probationary period. As a

probationary employee, an employee is terminable at will Prior to the conclusion of the probationary period, the probationary employee will either be offered a permanent position or be dismissed. Two performance appraisals are conducted during the probationary period. Mr. Barrey reviewed plaintiff's performance at the end of the first three month period and at the five-month mark. At plaintiff's three-month review, plaintiff was rated as "standard" but concern was expressed about plaintiff's productivity. DSOF 17. At her five-month review, plaintiff was rated as "below standard" and was not recommended for permanent status.

Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") on October 23, 1996 alleging racial discrimination. DSOF 35. The EEOC issued a right to sue letter after its investigation and determined that "the EEOC is unable to conclude that the information obtained establishes violations of the statutes." DSOF 36. Plaintiff, appearing pro se, then filed this Title VII action alleging race and sex discrimination, and retaliation.

1. Scope of the EEOC Charge

Defendant first contends that plaintiff's sex and retaliation claims are outside the scope of her EEOC charge. Before filing an action in federal court under Title VII, a private litigant must first file a complaint with the EEOC. 42 U.S.C. § 2000e-5; Stache v. Int'l Union of Bricklayers, 852 F.2d 1231, 1233 (9th Cir,1988), cert. denied, 493 U.S. 815 (1989) . To establish federal subject matter jurisdiction, plaintiff is required to exhaust her EEOC administrative remedies before seeking federal adjudication of her claims. See Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir.1990) ("The jurisdictional scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation.")

Charges before the EEOC are to be construed liberally, but an employee may not bring suit for incidents not listed in her charge unless they are "like or reasonably related to the allegations of :he EEOC charge." Id. at 1233-34 (internal quotations omitted). "When an employee seeks judicial relief for incidents not listed in his original charge, the judicial complaint may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts." Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir.1973). The rationale behind Oubichon is to "avoid creating needless procedural barriers." Id. The exhaustion requirement can lead to needless procedural barriers because, "[i]f closely related incidents occur after a charge has been filed, additional investigative and conciliative efforts would be redundant." Brown v. Puget Sound Elec. App. & Train. Trust, 732 F.2d 726, 729-30 (9th Cir.1984)

On the other hand, "[w]here claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated. . . . 'It is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Id. at 730 (quoting Serpe v. Four—Phase Systems,-Inc., 718 F.2d 935, 937 (9th Cir.1983)).

Plaintiff's sex discrimination and retaliation claims are not closely related to her racial discrimination claim. Accordingly, they are outside the scope of her EEOC charge. Plaintiff contends, however, that on January 11, 1999, she amended her EEOC charge to include sex discrimination.' Plaintiff thus argues that her EEOC charga

filed on October 23, 1996 was timely amended and that the amendment related back to the filing of the charge. As defendant

Plaintiff does not dispute that her ascended EEOC charge failed to include a retaliation claim, correctly notes, however, plaintiff's attempt to amend her EEOC charge after the EEOC's investigation has been completed is ineffective when there is no showing that the EEOC has reopened the investigation.

A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Balacz v. Liebenthal, 32 F.2d 151, 157 (4th Cir. 1994) . Although amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received, plaintiff's purported amendment is not related to her original charge of racial discrimination. Instead, the amendment attempts to initiate a new basis for finding discrimination, i.e., sex discrimination.

Moreover, the attempted amendment followed the issuance of a right to sue letter which divests the EEOC of jurisdiction, and the institution of this suit. Id., see also, Bacon v, Allstate Ins. 1995 WL 360736, *3 (N.D. Ill. 1995) . Plaintiff's amendment was not attempted until nearly 22 months had past since the right to sue letter was issued and only after defendant filed its motion for summary judgment. Under these circumstances, the amendment of the EEOC charge was futile, Neither plaintiff's sex discrimination nor retaliation claim can be considered in this case because they fall outside the scope of her EEOC charge

and her amendment was not effective.

2. Summary Judgment Standard

In evaluating a summary judgment motion, the inquiry is whether, with respect to any dispositive issue, the pleadings and supporting materials show there is no genuine issue of material fact, and if not, whether viewing the evidence and inferences which may be drawn therefrom in a light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. p. 56; California Architectural Building Products, Enc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. den. 484 U.S. 1006, 108 S. Ct. 698 (1988).

The moving party must produce evidence establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett., 477 U.S. 317, 106 S. Ct. 2548, 2553 (1986) . The absence of a genuine issue of material fact may be demonstrated by pointing out to the district court that "there is an absence of evidence to support the nonmoving party's case" on issues where the nonmoving party bears the burden of proof. Id. at 2554, Moreover, at the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but merely to determine whether there is a genuine issue for trial. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511 (1986),

If the non-moving party will bear the burden of proof at trial as to any element essential to its case, that party can withstand a motion for summary judgment only by making a showing sufficient to establish a genuine issue of fact regarding that element and a showing that the dispute properly may be resolved only by the if fact finder because

it could reasonably be resolved in favor of either party. Celotex Corp., 477 U.S. at 321, 106 S. Ct. at 2552-53; Anderson, 477 U.S. at 249, 106 8. Ct. at 2511.

In order to make such a showing, the party opposing the motion oust present specific facts in support of its contentions and must support these facts by proper evidentiary material, which when coupled with undisputed background and contextual facts, show that the fact-finder could reasonably find in his favor; the non-moving party cannot merely rest on his pleadings. Fed. R. Civ. P. 56(e). See also T.W, Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n 809 F.2d 626, 631 (9th Cir. 1987) (citations omitted)

Moreover, where the factual context makes the non-moving party's claim implausible, that party must come forward with evidence even more persuasive than would otherwise be necessary to show that there is a genuine issue for trial. California Building Products, 818 F.2d at 1468 (citing Matusushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 8. Ct. 1348, 1356 (1986)).

3. Racial Discrimination

The United States Supreme Court in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), clarified the order and allocation of proof required to show discrimination under Title VII. First, a plaintiff must show a prima facie case of discrimination by showing that (1) she belongs to a protected group; (2) she applied and qualified for a job in which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) the employer hired someone else outside of the protected group. Id. at 2747 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792,

302 (1973); see also Hughes v. Derwinski, 967 F.2d 1168,1171 (1992) . Second, upon proper showing of a prima facie case, the employer must rebut by producing evidence that the adverse employment action was for a legitimate non-discriminatory reason. Hicks, 113 U.S. at 2747. The employer must clearly set forth reasons for its actions, "which if believed by the trier of fact would support a finding that unlawful discrimination was not the cause of the employment action." Id. Although the burden of production shifts to defendant at this point, the ultimate burden of persuasion remains with the plaintiff throughout this burden shifting scheme. Id. Third, if the employer meets its burden of production, plaintiff must prove that the employer's articulated reason was a pretext for intentional discrimination in violation of Title VII. Id. Thus, plaintiff must show both that the reason given is false and that discrimination is the real reason. Id. at 2752. Summary judgment is appropriate where a plaintiff's evidence to refute a defendant's legitimate explanation is totally lacking, even though the plaintiff may have established a prima facie case. Callis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) . In other words, plaintiff must produce a genuine issue of material fact as to pretext to avoid summary judgment. Id. (citing Steckl T. Motorola, Inc., 703 F.2d 392, 393 (9th Cir, 1983). Douql Corp. v. Green, 411 U.S. 792, 802 (1973).

Assuming that plaintiff has made a prima facie showing, defendant has met its burden by articulating a legitimate reason or discharge: documented poor performance both in terms of quality and quantity. Thus, the presumption of unlawful discrimination simply drops out of the picture," id. at 511, 113 S. Ct. at 2749, and plaintiff bears the ultimate burden of persuading the court hat the stated reason for the discharge was false and the true reason for the discharge

was unlawful racial discrimination. Id. at 507-08, 113 S. Ct. at 2747-48; Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991) . To avoid summary judgment, plaintiff "must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses." Walliis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) (citation omitted). She must produce "specific, substantial evidence of pretext." Id.

Plaintiff contends that her supervisor, Richard Barrey altered the dates of her employment by two days to October 28 in order to lower her performance scores so as to justify her termination. It is undisputed that the other new hires with plaintiff had effective dates of October 28 as well. Thus, plaintiff cannot show that she was singled out on the basis of her race.

Additionally, plaintiff has not demonstrated that but for the change in effective date of employment, the quality of plaintiff's work would have been sufficient to raise her evaluation to a satisfactory level. It is undisputed that evaluations were based not only on quantity but quality both areas of concern in plaintiff's probationary period.

Plaintiff has produced no meaningful evidence indicating either that defendant's proffered explanation was false or that her supervisor harbored discriminatory animus towards her because she was black. Plaintiff appears to contend that she had been performing her job adequately even though had received feedback indicating otherwise. An employee's subjective personal judgments of her competence alone, however, do not raise a genuine issue of material fact. Schuler v. Chronicle Broadcasting Co., Inc., 793 F.2d 1010, 1011 (9th Cir. 1986) . Plaintiff has not pointed to any instances in which a black employee who failed to meet

performance standards was fired and a white employee who also failed to meet standard was not. No reasonable juror could find by a preponderance of the evidence that she is entitled to relief. Anderson v. Liberty Lobby, 477 242, 242, 252 (1986)

It is undisputed that plaintiff was hired by a panel that included Richard Barrey, the supervisor who subsequently recommended that plaintiff not be hired as a permanent employee. The Ninth Circuit holds that where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive. Bradley, 104 F.2d at 270-71. See Lowe v. J.B. Hunt Transp,, Inc., 963 F.2d

173 (8th Cir. 1992) (finding argument that company developed aversion to older people less than two years after hiring member of protected age group "simply incredible"); Buhrmaster v. OZvernite Tranp. Cc., 61 F.3d 461, 464 (6th Cir. 1995) ("An individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class."), cart. denied, 116 S. Ct. 785 (1996). But see Waldron v. SL Indus., Inc., 56 F.3d 491, 495 n. 6 (3d Cir. 1995). Plaintiff has not rebutted this inference. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996) . Instead, plaintiff states that "with proper discovery prove in a Court of law that their hiring was not based upon a fair hiring practice but they were hired only to show that they were meeting some quota under affirmative action for minorities and females - . . ." Response at

7. These unsupported allegations do not establish that defendant terminated plaintiff because of racial

discrimination. Nothing indicates that defendant preferred plaintiff's co-workers because of their race rather than their competence or performance, particularly in light of plaintiff's inadequate performance during the same period. Because plaintiff was terminated for failing to meet performance standards of quantity and quality, she must prove ;hat defendant does not terminate similarly situated white employees. in other words, white employees who fail to meet performance standards. McDonald v. Santa Fe Trail Transp. Co.,, 427 3.8. 273, 283 (1976); Garrett v. City of San Francisco, 818 F.2d

1515, 1519 (9th Cir. 1987) . Plaintiff has not come forward with any evidence that defendant retains white employees but fires black employees who fail to meet performance standards. Without evidence of pretext, no reasonable juror could find by a preponderance of the evidence that plaintiff is entitled to relief. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986) . Accordingly, defendant is entitled to summary judgment.

Based on the foregoing,

IT IS ORDERED granting defendant's motion for summary judgment. [doc, #641

FURTHER ORDERED directing the Clerk of the Court to enter judgment in accordance with this Order.

COURT JUDGE